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Utah Wilderness Association

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DIVISION OF
OIL GAS & MINING

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Dear Peter:

Enclosed are the comments of the Utah Wilderness Association on the proposed gypsum mine inside the Mt. Nebo Wilderness. From the outset we want to emphasize the Forest Service's obligation to protect wilderness values. To that end, we are very disappointed in the draft EIS. It glosses over the importance of wilderness values and does not represent the importance of continuing to protect those values. There are, however, options which should be pursued to protect the wilderness and recognize any legitimate interests of the mineral property owner.

Adequacy of the EIS

While this DEIS certainly portrays a picture of the environmental impacts of mining within a wilderness, the mandates of NEPA are not met on some major issues. For example, the lack of an adequate array of alternatives is profound as is the failure in the EIS to look at the scope of the document in conjunction with Forest Service administrative authority. The greatest failing, however, is that the Forest Service has assumed that it has no authority to preclude mining at the designated site, or short of that, to prescribe the type of mining activities which occur. We feel this is improper and an abrogation of the Forest Service's authority and role.

The lack of alternatives to the proposed action, particularly an alternative which would meet legal constraints for protecting the wilderness, is critical. NEPA and the CEQ regulations require analysis of a range of alternatives so the decisionmaker can have the information from which to make the best decision. It is not merely a paper exercise but a rigorous exploration of alternatives and options so the best informed decision can be made (see 40 CFR 1500, 1501.2(c), 1502.1 and 1502.14). In fact, the alternatives are considered "the heart" of an EIS (40 CFR 1502.14). Here, the Forest Service has failed to consider the alternatives of a purchase or exchange, or some type of underground mining as opposed to surface mining.

Of the three alternatives, only no action protects the wilderness. And the Forest Service claims this alternative is not legally feasible. We strongly disagree (see section entitled "Mineral Holdings"). The other two alternatives leave the wilderness needlessly harmed and that is contrary to the purposes for which the wilderness was established.

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The Forest Service has a significant and equal responsibility clearly laid out in policy to avoid the denigration of wilderness while seeking compatible mineral development scenarios. Without equivocation that is not possible as this proposal has been portrayed. Thus the agency clearly must seek another alternative. The principles adopted by the Forest Service which guide wilderness management take precedence. If the agency allows an unreclaimable strip mine for an unimportant mineral then it is placing wilderness in an inferior position, in violation of its own policies and federal law.

The only way to remedy this serious flaw in the draft EIS is to reissue the draft with a real array of alternatives that explore options to protect the wilderness. For example, the buyout or tradeout option of the mineral property should have been considered. This alternative protects both the wilderness and provides compensation for the minerals.

The EIS's failure to analyze this alternative is based upon erroneous and incomplete information (page II-1 and II-2). For example, it is presumptuous to assume that the mineral owner would not grant permission to drill the ore body to help determine its value if permission has not been requested. There is no indication that the Forest Service even sought permission to do so. Yet, without this information it is impossible to determine whether or not the gypsum is of sufficient value to warrant mining.

The Forest Service must exert leadership in preserving wilderness values rather than taking a passive role allowing wilderness to be destroyed as though it continues to be unimportant in the multiple use scenario. This issue speaks to a significant generic concern as well as a specific wilderness destruction issue. Our preference is that the agency must seek funds to purchase or trade out of this parcel of land. Options include an aggressive wilderness-protection-based negotiation with the subsurface owner to assure both fair private compensation and public protection, pursuing the LWCF, the Wilderness Land Trust, a private organization dedicated to purchasing inholdings within the National Wilderness Preservation System (we've enclosed their address and mission statement/protocol as an appendix to this comment), contacting the key congressional leadership to assist in purchasing the claims as well as other options, including condemnation.

It is also wrong to dismiss analyzing this alternative because it would require a financial investment of the Government. It is not a reluctance to invest government resources, rather it is misplaced priorities of an agency which sees limited value in protecting legally established wilderness areas.

How can the DEIS state that "land values do not support condemnation or a priority" for exchange or "purchase" in the absence of an appraisal (page II-2)? Again, this part of the DEIS really reflects the agency's disregard for wilderness values rather than any economic imperative. An alternative that proposes purchase or trade of the mineral property would also benefit all interests. It is the one alternative that would result in a win-win situation.

The EIS also hastily dismissed other potential alternatives such as primitive or underground mining. While these alternatives may seem prohibitive or infeasible from the perspective of the mineral owner, it is no more reasonable to require the public to sacrifice its wilderness and subject 50 plus acres to never being reclaimed with a 50% chance of massive slope failure. The Forest Service seems willing to abandon the broader public interest and the uniqueness of the Mt. Nebo Wilderness. This legal and binding interest can't be terminated simply because it

is easier or more expedient to grant the right to mine gypsum in an unreclaimable strip mine. The agency has a much more meaningful and complicated role to play and require a bit of leadership by the professional managers within the agency. The surface owner--the public--has rights in this instance and the Forest Service has the duty to see those rights are protected.

Since the NEPA requirements for adequate analysis of alternatives have not been met, a new draft EIS should be issued exploring other alternatives. That is the only logical course of action. The purpose of NEPA is to disclose impacts from agency sponsored activities affecting the human environment. Yet the agency has failed to take this required "hard look" at the full scope of alternatives to strip mining within a wilderness because of a false view that the agency has no decision authority. This is a "self fulfilling prophecy" rather than a realistic view of the public interest the agency is supposedly serving. CEQ regulations require, without exception, that the managing agency review and disclose impacts from a full range of alternatives even if some decision making authority is denied the federal agency. In this case the later is not a factor because of the equal bilateral responsibilities associated with wilderness designation. This is made even more clear because the surface is not patented and can't be patented. Surface responsibilities remain. Yet, the agency has failed to look at the full scope of the project because of its belief that legal constraints prevent its decisionmaking authority. The CEQ regulations are clear that agencies are to consider impacts of the proposal, even if certain decisionmaking authority is denied the federal agency. We seriously question the agency's perception of lack of authority in this case. The Forest Service does have the right to protect the Mt. Nebo Wilderness and to preclude destruction of its surface rights.

Scope of the EIS

The DEIS is fatally flawed because it assumes that the Forest Service can only regulate access to the mine site. If the Forest Service only has authority for regulation of access to this mine site (a position with which we do not concur), that implies a special use permit of some sort must be obtained for access. Prior to issuing such a permit a full scale plan of operations must be developed because without such a plan even the access questions cannot be adequately addressed. Some unanswered questions include size and frequency of truck traffic, road design and maintenance standards. The DEIS clearly notes that no complete plan of operations is available. Thus, the DEIS is premature and does not analyze the impacts to the human environment from the project.

If, on the other hand, the Forest Service feels this EIS will be the NEPA documentation for a Record of Decision approving a plan of operations, a plan of operation must be analyzed in the EIS. This EIS does not meet Forest Service Manual regulation for mining if that is the case (see FSM 2800). Regardless of the alternative selected, the DEIS does not analyze the full impact of the project because of these undisclosed factors. Certainly the proponent and other entities (Utah Division of Oil Gas and Mining) need to provide more information so the EIS can meet NEPA's mandates. Reissuance of the draft is in order.

The scope of the EIS also affects the NEPA analysis of mitigation measures. Because of the lack of a plan of operations, there are no specific mitigation measures proposed under any alternative. The DEIS simply leaves these questions to future plans, which have not yet been quantified or even specifically identified (page IV-6). Again, this is a cart before the horse problem and the EIS should be reissued in draft once the proponent has done his homework in presenting a complete plan of operations.

Cumulative and Environmental Impacts

While the DEIS does a fair job in describing the broad brush of impacts to soil and water resulting from a mine inside a wilderness area, it is not site specific. The DEIS also includes some inconsistencies on expected impacts:

Soils/Water

The DEIS notes that no activities are planned in the wetland or riparian areas (pages IV-3 and IV-5). However, impacts are expected to occur, according to the DEIS. That inconsistency needs to be resolved. In reality, the riparian area can't be avoided because the stream and historical stream channel, which still hosts some riparian vegetation and was a stream prior to the diversion, is exactly in the location where gypsum would be loaded. To anyone who has visited the site, it is obvious the riparian/wetland area will be affected by the operations. The filter box and catchment device are within the claim block, thus, the conclusions in the DEIS are based upon logical inconsistencies.

On one hand we are told that there is a 50% chance of mass slope failure (a landslide), that such an event could contain 25,620 cubic yards of material and would be about 1/3 water. On the other hand we are told that the "size of, or potential for, a landslide is impossible to predict." Why is there this inconsistency?

Furthermore, without a specific mitigation plan, impacts to the riparian and wetland areas can't be guaranteed. Thus, it is disingenuous to state in the EIS that "mitigation requirements will assure that no net loss of wetlands will occur, except from the possibility of a landslide" when there is a 50% chance of mass slope failure and the possibility of moving 25,620 cubic yards of material.

What the DEIS does show about potential impacts is they are far too great to meet state reclamation and federal and state water quality standards. With a 50% chance of mass slope failure and over 50 unreclaimable acres, the current proposal does not meet even the most minimal environmental and health regulations

Wilderness Impacts

While the DEIS acknowledges the wilderness as a holistic resource which will be impacted by this mining proposal and simultaneously recognizes this mining proposal will "violate the majority of society's wilderness values," it tends to understate these holistic physical and social values. The DEIS attempts to argue concurrently that wilderness is not a separate resource but that impacts will be disjunct and separated to only 63 acres and 1 mile of road. Both the popular and scientific literature clearly reveal the perception that even small impacts upon designated wilderness create disproportionate impacts on the values of wilderness due to the holistic interconnectedness of wilderness. Without a doubt it can be argued the very essence of the Mt. Nebo Wilderness can be significantly denigrated by this significant unreclaimable strip mining proposal both from a social and biophysical perspective. The message which would be sent out by a strip mine is that wilderness areas are to be protected only when it is convenient to do so. This needs further elucidation and is essential to show the significance of this impact on wilderness. It will also help the Forest Service develop and understand the cultural and

social values the broad publics' place on wilderness. This also makes it exceedingly clear as to why the Forest Service must pursue a vigorous leadership role to seek an alternative as discussed above to prohibit this impact, while protecting the extant wilderness values and equitably meeting the valuation of the Gardner Canyon subsurface values.

Cultural Resources

The DEIS claims no cultural resources would be impacted for this proposal on the national forest system lands. However, there is no indication that a survey has been done. A survey must be accomplished to meet Forest Service and NEPA regulations prior to a decision.

Wildlife/Threatened, Endangered and Sensitive Species

The DEIS, appendix H, indicates that no known threatened, endangered or sensitive species are thought to use the area. Yet, there is no indication that the necessary surveys to meet Forest Service Manual and Endangered Species Act requirements have been met. For example, has consultation with USFWS taken place to determine the absence of endangered and threatened species? What about the peregrine falcon, which has been reintroduced to the Wasatch Front? It is not mentioned in the DEIS at all.

Furthermore, the DEIS notes in the affected environment section that there is no habitat for threatened and endangered species (page III-4). There is no indication, however, that there is a presence or absence of sensitive species. The affected environment section further notes (page III-4 and III-5) that Gardner Canyon is not critical habitat for goshawks though they may visit the area. Were any surveys conducted to determine this fact?

Although sensitive plant work has occurred in the Nebo area, the indication in the appendix is that there was no survey of what may exist on the site. Rather the studies were specific inventories of certain species. The recommendation found in appendix H to remove Aster kingii var. kingii from the region's sensitive list does not obviate the Forest Service from conducting a survey of this and other similar taxa in the project area. This aster is still a Region IV sensitive species and must be treated as such until removed.

The DEIS assumes game species will be affected up to about 1/4 mile from the project area (page IV-7). How was this figure derived? It seems inconsistent with other information from Forest Service research on elk, for example, that are affected at distances of 1/2 mile or more.

Cumulative Impacts

The DEIS fails to assess the cumulative impacts of adjacent mining claims held by the proponent. That is an important NEPA issue, particularly if the mine expands. Given the questionable nature of gypsum as a hard rock mineral, the proponent could claim the adjacent claims contain valuable deposits of gypsum. The cumulative impacts of development of these contiguous claims is required under NEPA (40 CFR 1508.25)

Mineral Holdings

The DEIS is also inadequate because it fails to examine whatsoever the legality and extent of Steele's claim holding. In fact, the Forest Service's entire position is that since the Steeles have

a deeded interest in the gypsum that they have an absolute right to go forward with mining in the wilderness area. Further, it is assumed that the Forest Service has no authority to even restrict the type of mining which takes place. That is, that is has no authority to require subsurface mining versus open pit mining.

These assumptions, which underlie and form the basis for the limited scope of the DEIS prepared by the Forest Service need to be carefully explored. Recent case law, as well as decisions of the Interior Board of Land Appeals, would seem to indicate that gypsum may not be a patentable mineral, but that even if it is, it is within the Forest Service's authority to preclude open pit mining.

Limestone, gypsum and other minerals are not necessarily recognized as valuable and therefore not patentable. This was first recognized in the Gray Company Trust (on rehearing), 47 L.D. 18, 20 (1919) where the first secretary Vogelsagn made the following observation in finding that a claim for limestone was invalid:

"As to the limestone deposits, the existence of which upon portions of the ground is testified to by claimant's witnesses, it is sufficient to say that they have not been demonstrated to be of such quality as to give them any substantial value over and above other limestone deposits of that region which are there shown to exist in immense quantities and more favorably situated with relation to transportation facilities, or otherwise to bring them under the category of mineral deposits subject to location under the mining laws."

More recent decisions of the IBLA have reached similar conclusions. See for example, United States v. Sherman C. Smith and Lynda K. Sellers, IBLA 89-443 (decided August 22, 1990).

Here the patenting of the so-called "mineral interest" took place back in 1926, after the IBLA's decision in Gray Canyon Trust. That decision leaves some question as to whether patenting of the gypsum in question was proffered. The Forest Service should, as part of its DEIS, do a complete legal analysis of the issue to determine whether in fact the Steeles have a proper deedable interest in the gypsum. That is crucial because if the Forest Service finds they do not, the entire scope and extent of the DEIS must be modified.

Secondly, even if the Forest Service determines that the Steele's interest in the gypsum is deedable, the Forest Service still has the right to control the type of mining that occurs. This issue arose, in a somewhat different context, in Christensen v. Chromalloy American Corp., 66 P.2d 844 (Nev 1983). That case involved whether or not the owner of the mineral interests in barite has the right to conduct open pit mining operations which interfered with the ranch land upon which it was situated. In a carefully reasoned opinion the Nevada Supreme Court examined a number of prior cases involving the rights of holders of mineral rights to conduct open pit mining. The court concluded that the owner of the mineral rights did not have the authority to destroy the surface state. Rather the court concluded that even when there has been a separate transfer of mineral rights "vest in the surface estate owner unless the mineral estate owner can remove the mineral in question by methods of extraction which will not consume, deplete or destroy the surface estate." Christensen at 847.

Here, the proposed gypsum mine would destroy a significant portion of the surface estate. Even if the Forest Service concludes that the Steeles do have the right to conduct mining operations,

the Forest Service should and does have the authority to prevent them from engaging in mining activities which destroy the surface of the property. Accordingly, the DEIS should be redone to consider the alternative of other mining methods including underground mining operations which have a much more minimal impact of the surface rights than the current proposed mining scheme.

There is also an issue whether a common mineral like gypsum, or any specific mineral for that matter, was intended to be conveyed. There is a question of the definition of the "lode" referred to in the legal documents when United States Gypsum Co. transferred title {see also Nephi Plaster & Mfg. Co. v. Juab Co., 33 Utah 114, 93 P 53 (1907) and Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979)}.

Forest Service Ability to Regulate, Restrict or Prohibit Development

The Forest Service regulations governing access across wilderness lands prohibit such access unless the inholding is wholly within (36 CFR 293.13) or completely surrounded (36 CFR 293.12) by Wilderness lands. Neither is the case in this situation. The DEIS treats these regulations inconsistently. It argues the proposed access, Alternative 2, can be denied based on 36 CFR 293.12 (DEIS p. 11-7), but fails to recognize that Alternative 3, which allows road building on wilderness lands outside the claims, violates these regulations.

It has also been argued that federal agencies can deny access if the environmental consequences of the activity exceed its benefits. In Friends of the Earth v. Butz and Foundation for North American Wild Sheep v. United States the courts have required that EIS be prepared prior to approving mining access across public lands. Because the purpose of an EIS is to inform a decision maker prior to making a decision it follows that the decision maker has discretion to condition or deny access. (For an expanded discussion of this issue see "Public Natural Resources Law" (Chapters 10.01 and 25.04) by George C. Coggins. Clark Boardman Environmental Law Series. Clark Boardman Company, Ltd. 1990.) Importantly, how can such a determination be made until the extent of the gypsum reserves are determined.

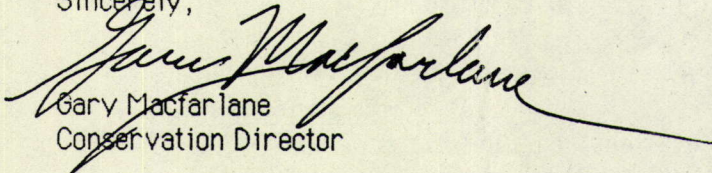
The DEIS states the Forest Service has rights under "Common and State Law" to protect the public interest (public lands) from unreasonable, careless or negligent use of the surface (DEIS p. 1-2). The DEIS does not explain or describe these common and state laws or how those rights can be exercised to prevent damage to public resources (i.e. Wilderness). Decision makers and the public need to know the extent of the agency's legal options to protect the Mt. Nebo Wilderness.

Under State Law governing reclamation the objective is "to return the land...to a stable ecological condition compatible with past, present, and probable future local land uses" (40-8-12). The past, present and future land use is as a designated Wilderness area which is not consistent with unreclaimable mining impacts. State regulations for reclamation require mine operators to "leave the on-site area in a condition which is capable of supporting the postmining land use." (R647-4-111). Again, the mine as proposed under Alternatives 2 and 3 in the DEIS is not consistent with these requirements of the state. Further, there is no indication that there is a governmental agency, state or federal, which has agreed to take on the responsibility of ensuring the area is reclaimed.

The DEIS failed to recognize important legal issues pertaining to Wilderness (DEIS p. IV-12). The issue of surface versus subsurface owner "rights" takes on a different meaning in wilderness areas. The Wilderness Act effectively modified the mining laws by restricting patenting to mineral resources only. The public would retain ownership of the surface in order to protect the surface and accompanying wilderness resource. The Forest Service clearly has an obligation to protect the wilderness resource where it owns the surface and the subsurface is patented. In this instance, the wilderness values of the surface estate will be destroyed if the mine is allowed as proposed in Alternatives 2 and 3. This is improper and an abrogation of the Forest Service's authority.

It is obvious that the Forest Service's interest, as the surface "owner" and manager/protector of public resources, will be unreasonably harmed. The finding in the EIS should clearly indicate such. It is equally clear the mine will not meet existing state laws and regulations. The DEIS should be unequivocal in its showing that the public interest will be harmed and that the Forest Service is empowered by both federal and state law to prohibit the type of mining operations proposed in the DEIS. The Forest Service should also consider its options under state and federal law to enter into cooperative agreements/MOUs with the state to ensure that the state recognizes the surface owner's interests will be unreasonably harmed by the proposed mine.

Sincerely,



Gary Macfarlane
Conservation Director

cc: Gray Reynolds, Regional Forester